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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 211

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

CHICAGO UNION STATION COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Scheffer Press, Inc.—ANdover 3-6850

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JURISDICTION.

Petitioner's jurisdictional statement cites the Interstate Commerce Act (49 U.S.C. 1, *et seq.*) and statutory provisions for federal question and commerce jurisdiction (28 U.S.C. 1331, 1337). These statutes were not pleaded or otherwise raised in the trial court, where petitioner waived any right to recover on a federal or commerce ground as shown in this brief. Only diversity of citizenship, which is alleged in the complaint, is a relevant ground of federal jurisdiction at this stage of the case.

QUESTIONS PRESENTED.

Petitioner's statement of questions presented (pp. 2-3) is misleading and based on a false analysis of the case. According to the petition, the question is whether the Carmack Amendment to the Interstate Commerce Act does not apply here "so as to permit diverse local law to control". This is contrary to petitioner's position in the trial court. Petitioner there insisted that local law did control and, in claiming that respondent is not a carrier, claimed that the Carmack Amendment did not apply. Petitioner has therefore waived, as argued in this brief, any right to recover under the question now claimed to be presented. There are other errors in petitioner's statement of the questions presented:

(a) In saying that the redcap did not inquire into the nature and value of the contents of the traveling bags, petitioner wrongly assumes that the redcap had a duty to make such an inquiry, whereas the relevant court decisions indicate the traveler had a duty to disclose this information.

(b) In saying that respondent "failed" to file a tariff schedule with the Interstate Commerce Commission and "failed to assert the existence of such tariff schedule", petitioner wrongly assumes that respondent had a duty to do so, although no such duty was alleged or otherwise urged by petitioner in the trial court.

(c) In treating as open the question of whether the redcap's placing of the bags in the taxicab constituted a "misdelivery", petitioner overlooks the trial court's holding that the bags were stolen from the redcap (Pet. App. 8 a).

On the record the only reviewable questions are: (1) did the trial court correctly find as a fact that petitioner's assured did not inform the redcap that the bags contained jewelry? and (2) did the trial court and the Court of Appeals rightly hold that this was a constructive fraud on respondent, was negligence by the assured, and precluded recovery by petitioner under Illinois law? (App. 97, 100).

RESTATEMENT OF THE CASE.

The statement of the case in the petition is inaccurate and argumentative.

Petitioner filed suit as subrogee in the District Court to recover $34,605.88 which it had paid as an alleged insurance loss to the owners of jewelry. The significant facts are fairly stated as follows (references are to the trial court's findings, App. 96-99, as well as the testimony):

One of petitioner's assureds, Harry Mintz, was a jewelry salesman. On Sunday, September 11, 1955, he went to the Union Station (owned and operated by respondent) in Chicago at about 4:25 in the afternoon to take a 5:00 o'clock train for Minneapolis (App. 96). Mintz delivered three traveling bags to a redcap, an employee of respondent, to be returned to Mintz at the train (App. 26, 74). One bag was a suitcase, and two were sample cases containing the jewelry for which petitioner later paid the alleged $34,605.88 loss. The redcap gave Mintz three claim checks. As found by the trial court, Mintz did not tell the redcap or any other employee of respondent that the sample cases were valuable or contained jewelry (App. 97).

At about 4:40, when the redcap had a full load of bags on his truck, a man approached him and said, "We are not making the trip; we are going to drive up by automobile to Minneapolis" (App. 75). The redcap asked who was not making the trip, and the man replied, "These three bags", pointing to Mintz' bags. The redcap said he had to get the claim checks, and the man replied that his brother had them and was telephoning (App. 76, 97). Five minutes later the same man came to the redcap again, said he and his brother were in a hurry, that his brother was finishing the phone call and would be there, and asked the redcap to take the three bags to the taxicab stand. The redcap did so, placing the bags in a taxi that drove up (App. 75-76, 97-98).

The redcap and the man were standing, waiting for the return of the man's alleged brother, when the redcap was summoned on the station's loudspeaker to deliver his other baggage. The redcap wanted the help of someone who would either take the baggage truck to the train or watch the man (App. 77, 83, 98). As the redcap opened the door leading into the train concourse to look for another redcap, he heard the taxicab start and, turning, saw it pull away (App. 77, 98). The baggage checks were not redelivered to the redcap or any other employee of the respondent. The jewelry cases were never recovered by Mintz or petitioner.

After a trial in the District Court without a jury, the trial judge gave an oral opinion (App. 92-96) and entered findings of fact, conclusions of law, and a judgment for respondent (App. 96-100). There were findings that both parties contended that the relationship involved was a bailment and that Illinois law governed (App. 99); that respondent held itself out to provide ushers to carry baggage ordinarily carried by travelers but not currency or jewelry or articles of great value (App. 99);

that the jewelry in Mintz' bags was a stock-in-trade carried for exhibition and sale (App. 99); that Mintz did not tell the redcap that the sample cases contained jewelry of great value (App. 97); that a bailment was not created (App. 99); and that Mintz committed a constructive legal fraud and was guilty of negligence in not telling the redcap of the jewelry in his baggage (App. 100). The Court of Appeals affirmed.

Petitioner's statement of the case says (p. 4) that Mintz "told the redcap that the sample cases were valuable", citing Appendix 26 and 43. This is Mintz' testimony which the trial judge emphatically stated he did not believe (App. 93). The trial judge also disbelieved the claim that the lost jewelry was worth $34,500, for at one time Mintz had stated in writing that the value was $20,000 or $21,000 (App. 95).

Petitioner says (p. 6) the redcap put the bags in the taxi "with the stranger inside". The cited record references (App. 76, 77) do not support the statement at all and show that the redcap and the stranger were standing together after the bags were put in the taxi.

Petitioner attempts to create the impression that this case was tried as a claim under the Carmack Amendment to the Interstate Commerce Act. Petitioner devotes much space (p. 5) to a discussion of the claim checks, saying that neither they nor any other notice limited respondent's liability. Petitioner says that the case "was argued below" on two theories, and the second is described as absolute liability under the Interstate Commerce Act as a result of respondent's alleged failure "to effect a valid limitation of liability by compliance therewith". As shown in this brief, petitioner itself rejected any such basis of recovery by contending in the trial court that the respondent was not a carrier. So, when peti-

tioner says (pp. 6-7) that neither the District Court nor the Court of Appeals considered the relevancy of the Interstate Commerce Act, petitioner is complaining of what it itself induced the District Court to do, *i.e.*, decide the case under the state law of bailments and not the federal law of carriers.

REASONS FOR DENYING WRIT.

Petitioner seems to argue two grounds for granting the writ. It is said, first, that the decision of the Court of Appeals is on a federal question and in conflict with the decision of this Court in the *Nothnagle* case, 346 U.S. 128 (1953). And it is argued that the case presents an important question under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 20 (11). Both contentions were waived in the trial court and are wholly unsound. This case was rightly decided below, and no question involved meets the high standards set by this Court in exercising its power to review. Petitioner's contentions are also based on a misunderstanding of the facts, the holdings of the two lower courts, and applicable legal principles.

1. Petitioner is estopped to assert liability under the Carmack Amendment.

Petitioner itself contended in the trial court that the law of bailments of the State of Illinois governed the transaction and that respondent is not a carrier. Now petitioner contends that respondent is a carrier liable under a federal law, the Carmack Amendment, 49 U.S.C. 20 (11), which imposes liability on a "common carrier, railroad, or transportation company subject to the provisions" of Part I of the Interstate Commerce Act. Petitioner's waiver of the federal basis of liability was not

by an isolated statement but by a repeated course of conduct.

In the complaint filed August 27, 1956, no federal statute was cited or referred to. The allegations were sufficient (App. 2) to show diversity of citizenship. There was no allegation that respondent is a carrier or is engaged in interstate activities.

As the trial opened on June 5, 1957, petitioner's counsel stated, "This action can be generally described as a bailment action". (Appellee's App. 1 a). Two days later, while the trial was still in progress, petitioner's counsel said that the law applicable to the case is "the law of the State of Illinois" under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (Appellee's App. 1 a). On the same day he said he agreed with respondent's counsel that the *Carrow* case, 73 Ill. 348, is the law of Illinois "and the law of the State of Illinois that applies"; and he explained that in referring to interstate commerce cases he had "simply pointed those cases out to your Honor to show even in the tariff cases . . . that the Supreme Court has said the passenger does not stand in the same relation to a situation as the railroad company" (Appellee's App. 1 a, 2 a). Petitioner thus persistently urged the trial court to decide the case according to the Illinois law of bailments.

On June 18, 1957, the court's findings and conclusions included a finding that both parties contended that the Illinois law of bailments governed the transaction (App. 99).

On June 26, 1957, petitioner filed a motion to set aside the findings, incorporated proposed findings, and also made a motion for a new trial (App. 100-119). These papers did not dispute the court's finding that the transaction was governed by the Illinois law of bailments (cf. App. 99, 107-108). Nor did they claim that the respondent

was a carrier or was liable to petitioner under the Interstate Commerce Act. In fact petitioner expressly stated that defendant was not a carrier and that Illinois law governed. For petitioner's motion said, "it is agreed that the law of Illinois governed the transaction" (App. 108). The motion also said:

> "Defendant is not a carrier. Admittedly it was an ordinary bailee for hire, hence it can neither claim the privileges and immunities of a carrier, nor is it saddled with the obligations of a carrier" (App. 108).

Petitioner's motions requested the trial court to find that the redcap knew that the sample cases were valuable, that the relationship between the salesman and respondent was that of bailor and bailee for hire, that there was a "misdelivery . . . and . . . in legal effect a conversion of the sample cases and their contents" making the respondent liable irrespective of negligence, that the misdelivery of the cases and their contents was the sole and proximate cause of their loss (App. 113, 116, 117).

After oral arguments on September 11, 1957, petitioner's motions were denied (App. 120, 121).

Petitioner thus induced the trial court to disregard both the state and federal law of carriers and decide the case by the state law of bailments. If the law of carriers or the Carmack Amendment were really applicable, petitioner misled the trial court into treating the relation as that of bailor and bailee. And petitioner also misled the respondent. Since petitioner sought recovery under the law of bailments, respondent made no effort to show that it is not a common law carrier or that it or this transaction is not within the language of the Carmack Amendment ("Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation, from a

point in one State . . . to a point in another State . . .''). See *Horelick* v. *Pennsylvania R. Co.*, 24 N.J.S. 413, 94 A. 2d 685 (1953), aff'd, on other grounds, 99 A. 2d 652, 655, holding that a station company such as respondent is not a carrier under the Carmack Amendment.

The Court of Appeals, as indicated by its opinion, decided the case as one involving the law of bailments and cited the *Carrow* case for a statement of the applicable legal principle (Pet. App. 4 a). The Court of Appeals thus followed what the record indicated to be the governing law.

Many decisions show that petitioner by its conduct has waived the right to assert liability under the state or federal law of carriers and is estopped to raise it. In *Minneapolis & St. Louis R.R. Co.* v. *Winters*, 242 U.S. 353, 356 (1916), the railroad did not object to the trial court's conclusion that the plaintiff employee was working in interstate commerce, and the case was decided under the Federal Employers' Liability Act. In holding that the railroad could not raise questions inconsistent with liability under the statute, Mr. Justice Holmes commented:

> ". . . even if the courts and parties were wrong about the proper basis for the suit that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below."

In *Petersen* v. *Chicago, Great Western Ry. Co.*, 138 F. 2d 304, 307 (C.A. 8, 1943), a passenger sought damages in a Nebraska federal court for an injury in Iowa and the case was tried on the assumption that Iowa law applied. It was held that the principles of "practical estoppel" prevented the plaintiff on appeal from contending that Nebraska law governed. In *Corbin* v. *B. & O. R. Co.*, 234 F. 2d 78, 81 (C.A. 6, 1956), the appellant discarded the

theory on which he tried the case and substituted a contradictory theory on appeal. The court said that "a party cannot be permitted to take advantage of errors which he has, even in good faith, invited or induced the district court to make". In *Gilby* v. *Travelers Ins. Co.*, 248 F. 2d 794, 797 (C.A. 8, 1957), where the record did not show that a matter had been raised in the trial court, it was said that the trial court, "having had no opportunity of passing upon the question now for the first time presented," could not be "charged with error in failing to do that which it was not requested to do". See also *New York, etc. Railroad Co.* v. *Estill*, 147 U.S. 591, 615 (1893).

Petitioner's waiver is not based on mere failure to plead jurisdiction based upon a federal question, as was claimed in the *Crispin* case, 134 F. Supp. 704, 706, relied on in the petition (p. 6). Here petitioner in the District Court sought to impose liability on one ground and expressly disclaimed another ground. And now on appeal the disclaimed ground is solely urged.

2. Respondent was rightly held not liable regardless of whether state or federal law governs.

While petitioner has waived the Carmack Amendment as a basis for liability as shown above, it is also true that respondent would not be liable under either the Carmack Amendment or common law carrier principles if they had been raised. In other words, even if it were an error for the trial court not to consider the Illinois or federal law of carriers, the error was harmless and is not ground for reversal.

The outstanding feature of this case is that petitioner's assured (Mintz) concealed from respondent the fact that his bags contained jewelry samples of great value. The trial court so held. Yet petitioner (p. 4) continues

to rely on Mintz' testimony at the trial that he told the redcap that the bags were valuable. Petitioner thus seeks to raise a disputed question of fact on certiorari. But the trial judge indicated his strong disbelief in Mintz' testimony on this and other points. The trial judge said in his oral opinion that Mintz "did not—and I am just as sure of that as I am sure of anything about this case—tell that redcap that that bag was valuable" (App. 93), and the written findings stated that Mintz ". . . did not inform the said redcap, or any other employee of the defendant, that the two black sample cases contained jewelry" (App. 97).

The trial judge concluded that Mintz was negligent in failing to disclose the contents of the bag. At one point the trial judge said that Mintz was guilty of gross negligence in "giving a $36,000 bag to a redcap in the Union Station without telling him what it is" (App. App. 3 a). Mintz' purpose, the trial judge said, was to get the jewelry from Chicago to Minneapolis without paying the ordinary transportation charge (App. 93). The trial judge's written conclusions said that the failure of Mintz to inform the respondent and its employees of the inclusion of the jewelry in the bags was "a constructive legal fraud" upon the respondent, and that Mintz "was guilty of negligence in failing to make such disclosure" (App. 100).

The conduct of Mintz was the legal cause of the loss. It is true that the redcap placed the bags in the taxi, but he did not voluntarily give up the bags without return of the claim checks. While he was waiting for the checks and was starting to the station concourse to get help, the bags were stolen from him. As said in the trial judge's opinion, the result was the same as if the man had "by stealth taken the three bags off the truck" (App. 94).

A judgment for the respondent necessarily followed whether the applicable law is the Illinois common law of bailments or carriers or the common law of carriers as codified in the Carmack Amendment to the Interstate Commerce Act.

(a) Under the *law of bailments,* which petitioner exclusively relied upon in the trial court, petitioner was unable to prove a cause of action because Mintz failed to tell the redcap that the bags contained jewelry of great value. "Since . . . the duties . . . of a bailee cannot be thrust on a person without his knowledge or consent, it is essential to a bailment that there be an acceptance of the subject matter by the bailee" (8 Corpus Juris Secundum 249). Here the $34,000 worth of jewelry was never accepted by respondent as bailee since Mintz did not reveal the contents or value of the bags to the redcap or any other agent of respondent.

This result is made clear by the early Illinois ruling in *Michigan Central R. Co.* v. *Carrow,* 73 Ill. 348 (1874), cited by the parties and the two lower courts in the case at bar. There a jewelry salesman's samples, worth about $30,000, were shipped by railroad in a trunk. The baggage car caught fire, and the contents were destroyed. The passenger sued the railroad in an action on the case. The railroad was held not liable under either the law of carriers or bailments. The court's full discussion of non-liability under the law of bailments (pp. 355-360) emphasized the failure of the passenger to inform the defendant of the valuable contents of the trunk. The opinion contained much language directly relevant here, including statements that there was no contract of bailment since the goods had been placed in the defendant's possession without its knowledge and consent and that the bailor's want of fair dealing was a full answer

to an action on an implied contract of bailment for hire (p. 357). The opinion also commented (p. 358) that the most that could be said was that the defendant was "a bailee without reward, as to the contents of . . . (the) trunk" so that it was "only obligated to slight care and could only be answerable for gross neglect". The evidence was then discussed, with the conclusion that the company was not guilty of gross negligence.

In the case at bar there was thus no bailment for hire while the redcap had the bags. The trial judge indicated that the only gross negligence in the record was that of Mintz (App. App. 3 a) in giving bags worth thousands of dollars to a redcap without telling him what they were. The redcap was not an armed guard hired to prevent the theft of valuables. So far as he knew, the bags contained only things of ordinary value that would not be stolen by an elaborate device such as that used here. He was merely performing his duties when he took the bags to the cab stand, placed them in the taxi, and stepped to the door of the station to get the help of another redcap. As the trial judge held, the redcap did not intend to deliver the bags until he got the claim checks, and the bags were stolen from him while he was engaged in the natural act of accommodating a traveler (App. 94). The legal fault that caused the loss of the bags was the negligence or fraud of Mintz, the traveler, and of course the theft by the stranger. Petitioner thus was unable to recover under the Illinois law of bailments.

(b) The same result follows under the *common law of carriers*, which generally imposes the high obligations of an insurer on the carrier when property is placed in its care by a shipper. Here Mintz' conduct would relieve

respondent of liability even if it were a carrier. The relevant common law principle is stated in 13 Corpus Juris Secundum 146:

> "Where the shipper either by his acts or his omissions fraudulently conceals the nature or the value of the goods shipped, the effect of such conduct is to relieve the carrier from its liability as insurer; . . . Thus, it has either been held or said in a number of decisions in which the goods shipped were money, jewelry, or other valuables so concealed as to hide their value and mislead the carrier, that the latter is discharged absolutely from any liability for loss or injury to such property; and this rule is particularly applicable if the loss is due to the carrier's omission of such precautions as were necessary to the safe transportation and delivery of the goods, superinduced by the shipper's fraudulent conduct."

In the *Carrow* case noted above, in discussing the carrier's liability, the Illinois Supreme Court explained that, while the trunk appeared to be that of a commercial traveler, the carrier's employee had no reason to suspect that it contained valuable jewelry and that the law imposed no obligation on the carrier to make inquiry as to the contents (73 Ill. at p. 351). The court also emphasized that the carrier's strict liability as an insurer is not imposed when the shipper fails to inform him of the value of the goods (pp. 351, 352):

> "Common carriers are compelled, by the nature of their vocation, to transport goods for all classes of people, and while they are, for politic reasons, to be held to the strict liability of insurers of the parcels intrusted to their care, the law imposes the duty upon the owner to act with common honesty. He will not be permitted to practice any imposition upon the carrier, or delude him as to the nature and

> value of the goods to be transported. The authorities on this branch of the law are quite numerous, and it is not necessary to do more than to cite a few of them. 2 Kent, 603 and 604; Story on Bailments, sec. 565; . . ."

Another clear illustration of the common law rule is *Humphreys* v. *Perry*, 148 U.S. 627 (1893). A traveling salesman for a jewelry firm shipped jewelry worth $10,000 in a trunk from Springfield to Petersburg, Illinois. Through the railroad's negligence the baggage car caught fire, and the contents of the trunk were destroyed. Recovery of the value of the jewelry was sought in a railroad receivership pending in a federal court in Illinois. Again the court's full opinion contains much relevant language on the failure of a passenger to inform the carrier of the value of the trunk's contents. For that reason the railroad was held not liable. Many authorities were discussed, including a statement from Story on Bailments that the person sending goods by a carrier has a duty "to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened" and any such fraud or unfair concealment would exempt the carrier from responsibility "or, more properly speaking, it will make the contract a nullity" (p. 641-2).

Here, as in the *Carrow* and *Humphreys* decisions, both of which cite many similar cases, the traveling salesman's concealment of the facts concerning the contents of the bags greatly increased the likelihood of theft by stealth or even armed robbery. Under the common law of carriers, respondent was in these circumstances not liable as an insurer even if otherwise the relationship of carrier and shipper existed between it and Mintz. Respondent was relieved of liability under the principle, as stated in the *Carrow* case, 73 Ill. at 360, that

". . . the passenger, who has the information, should apprise the company of the extraordinary value of the package he desires to have checked as baggage, and, upon failure to do so, if loss ensues, he must bear the consequences".

(c) This same common law principle is incorporated into the *Carmack Amendment* to the Interstate Commerce Act. The relevant language of section 20(11), which was in the statute when originally enacted in 1906 (34 Stat. 584), is that the carrier is liable to the shipper "for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered . . ." The petition for certiorari treats the Carmack Amendment as if it imposed a complete and unlimited liability on the carrier except as modified by a tariff. This interpretation was rejected long ago.

In *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 506-7 (1912), it was contended that the words "any loss, damage or injury" meant that "an absolute liability exists for every loss, damage or injury, from any and every cause". But it was held that the statute "plainly implies a liability for some default in its common law duty as a common carrier". See also *Missouri, Kansas & Texas Ry. Co.* v. *Harriman*, 227 U.S. 657, 672 (1913).

In *Boh Bros. Const. Co.* v. *Perry Heavy Haulers*, 72 F. Supp. 102, 104, aff'd 166 F. 2d 719 (C.A. 5, 1948), where a shipper sued under the Carmack Amendment for damage to the shipment and the carrier claimed the loss was caused by the shipper's improper loading, the trial court said the Carmack Amendment did not make the carrier an "absolute insurer" and had not changed the "common law doctrine in respect to a carrier's liability for loss occurring on its line". The common law was

said not to create liability when the damage arises from "acts of the shipper". In affirming, the Court of Appeals said the "fault of the shipper exonerated the carrier".

Recently, in *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 165 n. 9 (1956), the opinion said the Carmack Amendment "codified the common-law rule making the carrier liable without proof of negligence for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned *by the shipper,* acts of God, the public enemy, . . ." (Italics added).

The Carmack Amendment, which thus continues the common law principle that the carrier is not liable for damage caused by the act of the shipper, necessarily incorporates the rule of the *Humphreys* case cited above, 148 U.S. 627, that a carrier is not liable for loss of baggage containing valuable jewelry when the shipper conceals the contents of the baggage. Here, treating Mintz as a shipper and respondent as a carrier subject to the Carmack Amendment, his failure to inform the redcap of the contents of his bags with an increase in the risk of loss shows that the loss was caused by the shipper rather than by the carrier.

Thus respondent would have been held not liable even if the petitioner had sought in the trial court to impose a carrier's liability on respondent under the Carmack Amendment and even if the respondent and the carrying of bags by redcaps were within the coverage of the Carmack Amendment.

It is significant that petitioner does not cite a single case in which, at common law or under the Carmack Amendment, a traveler was allowed recovery when he failed to disclose the extraordinary value of the con-

tents of his bags. It is this controlling fact in the case at bar that clearly differentiates the 4 to 3 decision in *Araje* v. *Pennsylvania R. Co.*, 251 N.Y. 354, 167 N.E. 497 (1929), which petitioner emphasized in the Court of Appeals. There a trunk checked as passenger's baggage contained a stock-in-trade of linens and laces. A value of $2500 was declared by the passenger, and he paid an extra charge for excess value. The trunk was lost. In suing, the passenger alleged the value to be $12,500 (see 223 N.Y.S. 544) but only the $2500 declared value was sought to be recovered. The railroad defended on the ground that its tariff schedule provided only for carrying personal effects and salesmen's samples as passenger's baggage so that carriage of the stock-in-trade was contrary to its tariff. The majority opinion explained that it was not clear that the tariff provision had been violated; there was no fault on the passenger's part since the facts did not clearly show that he should have known that merchandise could not be carried as baggage; that there was no fraudulent concealment by the passenger; and that a holding of liability was not contrary to the decision in the *Humphreys* case. Unlike the *Araje* case, the plaintiffs in *Humphreys* and the case at bar sought to recover the great value of objects which were concealed from the defendants.

The case at bar was thus correctly decided by the District Court and Court of Appeals whether one approaches the case from the direction of the state or federal law of bailments or carriers.

3. The holdings below are not inconsistent with New York, N.H. & H.R. Co. v. Nothnagle, 346 U.S. 128 (1953).

Most of petitioner's argument (pp. 7-9) is devoted to an attempt to show that the holding for respondent is in "direct conflict" with the *Nothnagle* case. Since that

is a Carmack Amendment case, petitioner has clearly waived any right to use it as a precedent as shown above. And it is also clear that the holding for respondent has an entirely different basis, both factual and legal, from anything involved in *Nothnagle*.

In *Nothnagle* a passenger traveling from Connecticut to Massachusetts gave her suitcase, at an intermediate transfer point, to a redcap who was a railroad employee. The suitcase vanished. The passenger sued for damages in a Connecticut court. Most significantly, *the railroad admitted liability*. For the railroad stipulated that the bag and contents were worth $615 and "were lost due to petitioner's negligence" (346 U.S. at p. 129). The railroad defended on the ground that its tariff filed with the Interstate Commerce Commission limited its liability to $25 unless the passenger had declared a higher valuation. The state courts and, on the railroad's application for certiorari, this Court ruled that the limitation of liability in the tariff was not a defense because the value had not been declared by the shipper or agreed on in writing as required by the Carmack Amendment.

The initial question of the carrier's liability for loss of the goods was thus stipulated out of the *Nothnagle* case. In contrast, in the case at bar, the two lower courts have held that respondent is not liable because the loss was caused by the passenger's own act. If the limiting of liability were a question in the case at bar, it has never been reached because there is no liability to be limited.

Petitioner (p. 7) says that in *Nothnagle* "there was no disclosure of the contents of the receptacles" and that "no inquiry was made by the redcap with respect thereto". That was not stated in the Supreme Court's opinion. The stipulated value of the contents ($615) indicates that they probably consisted of personal effects.

And, since the railroad stipulated to its own liability, the concealment or inquiry as to the contents of the bag was immaterial. In contrast, the concealment of jewelry samples worth over $30,000 was a crucial fact in the case at bar under settled principles of the law of bailments and carriers.

Petitioner argues that the courts below have created "additional limitations to the application of the Carmack Amendment" which the *Nothnagle* case said were not intended by Congress; and that the law of the *Carrow* case, 73 Ill. 348, decided in 1874, and relied on in the courts below, has been superseded by Congress "with a national uniform policy governing interstate carriers' liability for property loss". Petitioner overlooks what was done by the Carmack Amendment to achieve national uniformity concerning one aspect of property loss, *i. e.*, the initial question of the carrier's liability. The "nationally uniform policy governing interstate carriers' liability for property loss" (*Nothnagle*, p. 131) takes the form in the Carmack Amendment of "the liability imposed by the common law upon common carriers" (*Mo. Kan. Ry.* v. *Harriman*, 227 U.S. at 672). The decisions of the courts below in the present case are in full accord with this congressional policy.

Petitioner's misunderstanding of the *Nothnagle* case is related to its misunderstanding of the Carmack Amendment. Petitioner wrongly assumes that the Carmack Amendment imposes the absolute liability of an insurer on the carrier whether the loss is caused by an act of the shipper or the public enemy or an act of God. Petitioner then concludes that the *Nothnagle* case indicates that a tariff limitation is the only possible means for the carrier to escape full liability. On the contrary, the opinion in the *Nothnagle* case (p. 133 n. 7) itself

recognized that under some circumstances the carrier would not be liable under the Carmack Amendment, for the court described the full recovery contemplated by Congress as arising "under such circumstances as to make the carrier liable". All the *Nothnagle* case stands for is that if there is liability under the Carmack Amendment the liability cannot be limited to an arbitrary figure without informing the passenger of the limitation. That result is not relevant to any issue in the case at bar.

CONCLUSION.

The contentions now made by petitioner were waived by it in the trial court. Petitioner's arguments for granting the writ ignore crucial findings of fact in the trial court and the relevant legal principles. The decision sought to be reviewed is not in conflict with the *Nothnagle* or any other federal case and is in accord with the polity and language of the Carmack Amendment to the Interstate Commerce Act.

Respondent urges that the writ of certiorari be denied.

Respectfully submitted.

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